U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: April 28, 1998

CASE NO.: **97 INA 251**

In the Matter of:

FRATELLI RESTAURANT,
Employer

on behalf of

PIERO DI CLEMENTE,
Alien

Before: Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of PIERO DI CLEMENTE ("Alien") by FRATELLI RESTAURANT ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at New York, New York, denied Employer's application it filed this appeal pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On April 25, 1995, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Pastry Chef Garde Manger" in the Employer's restaurant. AF 35. The Employer described the job duties as follows:

> Mixes and measures ingredients to make dough using electric or hand mixers. Shapes the dough for pastries, pies or bread loaves. Sets oven temperature and bakes them. Prepares desserts, cakes and puddings. Prepares pie fillings and decorates them.
> Prepares appetizers, cold meat dishes, salads, hors d'oeuvres. Slices and sets dishes of meats and cheeses. Makes meat glazes, sauces, stuffing. Complements, assists in the preparation of main course dishes, sometimes follows instructions in preparing same. Supervises 2 pantry workers.

AF 05 (Quoted verbatim without change or correction.) The hours were 12:00 AM to 8:00 PM in a forty hour week at $6.25 per hour and ten hours of overtime at $9.40 per hour. The position was classified under DOT Occupational Code No. 313.361-034,[2] as a Garde Manger (hotel & rest.), however.[3] While Employer did not state educational criteria, the Other Special Requirements were one year and six months of experience in the Job Offered or one year of "Restaurant experience w[ith] salads, veg[etables and] meats."[4] One U. S. worker responded to the recruitment advertisement, but was not hired. AF 41-44.

Notice of Findings. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") of August 6, 1996. AF 45-48. The CO found under. While taking note of its letter of September 18, 1995, the CO concluded that the Employer failed to document the business necessity of the combination of the duties of a Pastry

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

[3]313.361-034 Garde Manger Prepares such dishes as meat loaves and salads, using leftover meats, seafoods, and poultry. This worker also prepares appetizers, relishes, and hors d'oeuvres. In addition, he chops, dices and grinds meats and vegetables; he slices cold meats and cheese, arranges and garnishes cold meat dishes; and he prepares cold meat sandwiches, and mixes and prepares cold sauces, meat glazes, jellies, salad dressings, and stuffings. GOE: 05.05.10.08 STRENGTH: L GED: R3 M2 L2 SVP: 7 DLU: 77.

[4]The Alien's experience was as a Kitchen Helper in a restaurant in Mexico, where he prepared and filled dough, which was baked and decorated. He also prepared salads of vegetables, cold cuts and cheeses and mixed the ingredients; and he also set up unit dishes and made meat glazes and sausages. ETA 750B does not suggest that the Alien's background included the functions of a Pastry Chef that were mentioned in Item 13 of ETA 750B.

Chef and a Garde Manger, as the application and advertisement stated two completely different occupations with duties that are not normally combined and performed by a single worker. In this case, said the CO, the combination of jobs appeared to be a matter of convenience in light of the fact that the Alien's experience in both positions was acquired as a result of having been trained on the job by the Employer.[5]

If the job requirements were not amended to comply with 20 CFR § 656.21(b)(2), the CO directed the Employer to establish that the job requirements are those normally required for the performance of the job in the United States, as defined in the DOT. In the alternative, the Employer was directed to prove the business necessity of the combined duties it described in its application. The CO said this combination of the duties of Pastry Chef and Garde manger was unrealistic and restrictive, explaining that the Garde Manger normally commands the higher salary and that baking experience was not normally required to qualify as a Garde Manager.

Under 20 CFR § 656.21(b)(5) the CO further directed the Employer to prove that its hiring criteria for the position were the minimum necessary for the performance of the job. The CO found that the Alien had no experience in the job offered before the Employer hired him and that when the application was filed the Alien only had about four months of experience in the position offered and demonstrated no qualify experience as a Cook that was acquired in his prior job as a Kitchen Helper. Assuming that the Employer had trained the Alien to its satisfaction during his four months on the job, the CO directed the Employer to explain why it could not train a U. S. worker at this time. Otherwise, the Employer was directed to provide evidence that the Alien either had one year of experience in the job offered or one year of experience as a Cook when he was first hired, or amend its job requirements to the level of the Alien's experience at the time he was initially employed. AF 46. The CO then stated in detail the data and exhibits needed to establish the facts discussed in the NOF, which were required as proof in the Employer's rebuttal.AF 45.

Rebuttal. The Employer's September 9, 1996, rebuttal addressed the issues stated in the NOF. AF 50-61. The Employer's new evidence included the statement of the head cook in the Alien's former restaurant job in Mexico, who discussed his culinary training while working there; and a statement by the Employer's owner, who said that at the time of hiring the Alien was "proficient in making salads, appetizers, sausages and baked foods and pastries." AF 52-54. In its Rebuttal counsel for the Employer conceded that the duties of Garde Manger and Pastry Chef are normally independent. The Employer then argued that the work of a Garde Manger commonly included other duties in the kitchen, citing the DOT entry and arguing in effect that the Garde Manger duties without more would require only forty per cent of that worker's time. The

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[5]After the events discussed in footnote 3, the Alien later represented in AF 68 that he was unemployed from May 1994, the date he left the employment in a Mexican restaurant, to January 1995, the date he was hired by the Employer. In a revised version of the ETA Form 750B that was filed on an unknown date, the Alien stated that he was Pastry Chef and Garde Manger for the Employer from January 1995 to the "present," a date that appears to be either March 20, 1995, the date of signature, or April 25, 1995, the date the ETA Form 750A was filed.

Rebuttal repeatedly cited and relied on that part of the DOT job description that said this worker, "May follow recipes to prepare foods." AF 60-61.
The Employer then discussed its requirement that this worker also function as a baker and admitted that the positions of Garde Manger and Pastry Chef are different and that the duties it sought to impose on the Garde Manger were essential to the work of a Baker or Pastry Chef. AF 60.[6]

Final Determination. The CO denied certification in the Final Determination issued on September 18, 1996. The CO accepted Employer's statement that it was willing to delete the restrictive requirement in Item 15 of ETA Form 750A under 20 CFR § 656.21(b)(2). In addition, the CO decided to accept the Rebuttal representations as to the Alien's prior experience pursuant to 20 CFR § 656.21(b)(5). AF 63. The CO then concluded that the duties of a Pastry Chef and a Garde Manger are "two completely different occupations with duties not normally combined and performed by one individual." This difference, however, was not the basis for the CO's rejection of the application.

The basis for denial was that the Employer failed either to amend the job duties or to prove that this combination of duties was consistent with the regulations. The CO concluded that,

> Employer failed to amend his job duties and rebuttal provides no comprehensive documentation demonstrating that employer has normally employed persons for this combination of duties and/or that workers customarily perform the combination of duties in the area of intended employment, and/or that the combination of duties is based on business necessity.

AF 63. As a result, the CO denied certification.

Appeal. On October 12, 1996, the Employer appealed from the CO's denial of alien labor certification and requested review. AF 65-74. The Employer now filed the amendments in the ETA Form 750A that the CO's NOF had initially directed and it offered to readvertise the position, as thus altered, enclosing a proposed form of the advertisement.

Discussion

While an employer may adopt any qualifications it may fancy for the workers it hires in its

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[6] While the Employer pointedly implied that the CO had misinterpreted a clear statement of the Alien's former duties to conclude that he was simply a Kitchen Helper, the explicit terms of the Alien's own application stated this term as the job he had held and said nothing to indicate any of the much higher level of expertise that it claimed in the Rebuttal. See AF 59. If counsel's argument is given serious consideration in this context, it is clear that the Alien's representations from the text of his ETA Form 750B, which was given under penalty of perjury pursuant to 28 U.S.C. § 1746, were changed for the Rebuttal. At this point it was within the discretion of the CO to accept or reject the credibility of counsel's assertions, which were not verified by the signature of either the Employer or the Alien

business, its use of additional hiring standards and recruiting practices is limited by the Act and regulations when the employer applies such criteria and procedures to U. S. job seekers in the course of testing the labor market in support of an application for certification to hire an alien for the job at issue.[7] The Employer's appeal consisted of an offer to accept and comply with the directions of the NOF.

It is well established that evidence first submitted with the request for review will not be considered by the Board. **Memorial Granite**, 94 INA 066 (Dec. 23, 1994). The Board has firmly held that the Employer cannot supplement the record on appeal. **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992); also see **ST Systems, Inc.**, 92 INA 279 (Sep. 2, 1993). The Employer had a full opportunity to confront and to file evidence on all of the issues discussed in the NOF. Moreover, its posture on appeal does not relate to evidence, but to its failure to elect at the time it filed the Rebuttal the remedy it now seeks to implement. The CO's denial of certification will be affirmed in this case because the Employer's offer to cure a deficiency noted in the NOF after the Final Determination has been issued is untimely. **Dharmanidhi Social Services**, 90 INA 467 (Aug. 4, 1992).

For these reasons we conclude that the Certifying Officer's denial of alien labor certification was supported by sufficient evidence of record and should be affirmed. Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER

[7] As BALCA long ago pointed out, if an employer wishes to obtain labor certifications for an alien, it must modify its policies to conform with the regulations. **Security Life of Denver**, 88 INA 246, (Aug. 22, 1989). Moreover, Employer's claim that such practices were standard industry procedure was not supported by any evidence of record to support the finding that this assertion was factual. **Gencorp**, 87 INA 659 (Jan.13, 1988)(*en banc*).

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.